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In the Supreme Court of the United States

OCTOBER TERM, 1934

No. 35

NATIONAL PAPER PRODUCTS COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 36

ZELLERBACH PAPER COMPANY, A CORPORATION, petitioner

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the Board of Tax Appeals is reported in 26 B. T. A. 92.[1] The opinion of the Cir-

[1] No. 35, R. 21–28; No. 36, R. 18–25.

cuit Court of Appeals [2] is reported in 69 F. (2d) 857.

JURISDICTION

The judgments of the Circuit Court of Appeals [3] were entered February 28, 1934. A joint petition for writs of certiorari was filed May 10, 1934, and granted June 4, 1934.[4] The jurisdiction of this Court is based on Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Where a return is filed under the Revenue Act of 1924 prior to the enactment of the Revenue Act of 1926 and thereafter a return for the same period is filed under the 1926 Act because of its retroactivity, whether the statute of limitations under the 1926 Act commences to run from the date of the filing of the earlier or the later return.

STATUTES AND REGULATIONS INVOLVED

The statutes and regulations involved are set forth in Appendix A, *infra*.

STATEMENT

The facts as found by the Board of Tax Appeals may be summarized as follows: [5]

---

[2] No. 35, R. 94–111; No. 36, R. 88.

[3] No. 35, R. 112; No. 36, R. 89.

[4] No. 35, R. 117; No. 36, R. 92.

[5] Unless otherwise specified, references hereinafter made are to the record in No. 35.

Pursuant to the Revenue Act of 1924, Zellerbach Paper Company (petitioner in No. 36) on July 15, 1925, filed a consolidated income tax return for the fiscal year ending April 30, 1925, on behalf of itself and its subsidiaries, one of which was National Paper Products Company (petitioner in No. 35). (R. 22.) Thereafter, the Revenue Act of 1926 was enacted and made applicable to the year 1925.

Treasury Decision 3843 required the filing of an additional return for the same period where the amount of tax was increased by the 1926 Act. (Appendix B, *infra*.) In response to that ruling, the Zellerbach Company on May 14, 1926 [6] filed another return covering the period in question, showing an additional tax. (R. 23.) The affidavit stated that such return was made pursuant to the 1926 Act.

A deficiency notice was mailed to the petitioners on October 10, 1928, pursuant to which the Board of Tax Appeals found deficiencies of $20,657.40 against the National Company (No. 35, R. 29), and $7,601.55 against the Zellerbach Company (No. 36, R. 26). The Board's determination was upheld by the Circuit Court of Appeals. (R. 94–112.)

ARGUMENT

The taxes involved are governed by the 1926 Act. (Sections 286 and 200 (a) of the Revenue Act of

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[6] The record shows 1925 as the year (R. 23), but this is obviously erroneous.

1926, *infra*, p. 6, 7.) The applicable limitation on assessment of taxes due under the 1926 Act is found in Section 277 (a) (1), (*infra*, p. 6), where it is stated:

> The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, * * *.

The deficiency notice was mailed October 10, 1928 (R. 23), more than three years from the date of the first return (July 15, 1925), but within three years of the second (May 14, 1926).

The present cases differ from those presented by the petition in Nos. 37–39 in that here the transition was from the 1924 to the 1926 Revenue Acts, whereas in Nos. 37–39 the transition was from the 1918 Act to the 1921 Act. The present cases also differ from Nos. 37–39 in that here a new return was actually filed under the later statute. However, all of these cases present substantially the same question, namely, whether the "return" filed under the earlier statute is *the return* required by the later statute. Our position on this issue is set forth in our brief in Nos. 37–39, to which we here make reference.

Such differences as there are between these cases and Nos. 37–39 would seem to make the Commissioner's position stronger here. The character of the change from the 1924 Act to the 1926 Act, particularly in the rate of taxation, was more funda-

mental than the changes involved in the other two Acts. Consequently, it is all the more reasonable to assume that Congress never intended to adopt the old returns.

CONCLUSION

The judgments below should be affirmed.

Respectfully submitted.

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OCTOBER 1934.

APPENDIX A

Revenue Act of 1926, c. 27, 44 Stat. 9:

SEC. 200. When used in this title—

(a) The term "taxable year" means the calendar year, or the fiscal year ending during such calendar year, upon the basis of which the net income is computed under section 212 or 232. The term "fiscal year" means an accounting period of twelve months ending on the last day of any month other than December. The term "taxable year" includes, in the case of a return made for a fractional part of a year under the provisions of this title or under regulations prescribed by the Commissioner with the approval of the Secretary, the period for which such return is made. The first taxable year, to be called the taxable year 1925, shall be the calendar year 1925 or any fiscal year ending during the calendar year 1925.

* * * * *

(U. S. C. App., Title 26, Sec. 931.)

SEC. 273. As used in this title in respect of a tax imposed by this title the term "deficiency" means—

(1) The amount by which the tax imposed by this title exceeds the amount shown as the tax by the taxpayer upon his return; * * *.

* * * * *

(U. S. C. App., Title 26, Sec. 1047.)

SEC. 277. (a) Except as provided in section 278—

(1) The amount of income taxes imposed by this Act shall be assessed within three years after the return was filed, and no proceeding in court without assessment for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(U. S. C. App., Title 26, Sec. 1057.)

SEC. 278. (a) In the case of a false or fraudulent return with intent to evade tax or of a failure to file a return the tax may be assessed, or a proceeding in court for the collection of such tax may be begun without assessment, at any time.

* * * * *

(U. S. C. App., Title 26, Sec. 1058.)

SEC. 286. This title shall take effect as of January 1, 1925, except that section 257 and sections 271 to 285, inclusive, and this section, shall take effect on the enactment of this Act.

(U. S. C. App., Title 26, Sec. 941.)

Treasury Regulations 69, promulgated under the Revenue Act of 1926:

ART. 631. *Affiliated corporations.*—Consolidated returns are based upon the principle of levying the tax according to the true net income of a single enterprise, even though the business is operated through more than one corporation. Where one corporation owns the capital stock of another corporation or other corporations, or where the stock of two or more corporations is owned by the same interest, a situation results which is closely analogous to that of a business maintaining one or more branch establishments. In the latter case, because of the

direct ownership of the property, the net income of the branch forms a part of the net income of the entire organization.

ART. 632. *Consolidated returns.*—Affiliated corporations as defined in section 240 (d), irrespective of the basis upon which returns were filed prior to 1926 under section 240 (a) of the Revenue Acts of 1924 and 1926, may for 1926 elect to make separate returns or file a consolidated return in which will be reported the consolidated net income of the affiliated group. If return is made upon either of these bases, all subsequent returns must be made upon the same basis except as permission to change may be granted by the Commissioner. In applying for permission to change from one basis to the other there should be submitted a statement in the form of an affidavit executed by a person or persons qualified to sign the returns (see section 239) setting forth completely the reasons for making the request.

* * * * *

ART. 633. *When corporations are affiliated.*—For the taxable year 1925 two or more domestic corporations will be deemed to be affiliated if one corporaton owns at least 95 percent of the voting stock of the other or others, or if at least 95 percent of the voting stock of two or more corporations is owned by the same interests. For 1926 and subsequent taxable years two or more domestic corporations will be deemed to be affiliated if one corporation owns at least 95 percent of all the stock of the other or others, exclusive of nonvoting stock which is limited and preferred as to dividends, or if at least 95 percent of the stock of two or more corporations, exclusive of nonvoting stock limited and preferred as to dividends, is owned by the same interests.

ART. 634. *Change in ownership during taxable year.*—(*a*) Where corporations are affiliated at the beginning of a taxable year but due to a change in stock ownership during the year the affiliated status is terminated, or (*b*) where corporations are not affiliated at the beginning of the taxable year but through change of stock ownership during the year become affiliated, a full disclosure of the circumstances of such changes of stock ownership shall be submitted to the Commissioner.

Ordinarily in such cases, where only two corporations are involved, the parent or principal corporation, under the conditions described in (*a*) above, should file a consolidated return including the income of such subsidiary or subordinate corporation to the date of the change of stock ownership, and each should file a separate return from the date of such change in stock ownership to the end of the taxable period, and, under the conditions described in (*b*) above, each corporation should file a separate return from the beginning of the taxable period to the date of the change in stock ownership, and a consolidated return should be filed by the parent or principal corporation from the date of change of stock ownership to the end of the taxable year, including therein the income of the subsidiary or subordinate corporation for such period.

* * * * *

APPENDIX B

T. D. 3843 (V–1 Cumulative Bulletin 99), approved April 1, 1926:

> *To Collectors of Internal Revenue and Others Concerned:*
>
> Any corporation which has filed a return for a fiscal year ending in 1925 and paid or become liable for a tax computed under the Revenue Act of 1924, and is subject to additional tax for the same period under the Revenue Act of 1926, must file a new return covering such additional tax on or before May 15, 1926. Payment of the additional tax may be made at the time the return is filed or, if installment payments are desired, such installments must be paid at the time they would be due if based upon a return for the fiscal year ended February 28, 1926.

U. S. GOVERNMENT PRINTING OFFICE: 1934